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United States Supreme Court

Term, 1965

No. 436

EDWARD TIESI,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

The attorney for the petitioner, Edward Tiesi, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey.

Opinions Below

No written opinions. The Appellate Division of the New Jersey Superior Court affirmed the trial court, per curiam. The New Jersey Supreme Court denied certiorari during September Term 1964 at Docket No. C-102.

Jurisdiction

The judgment of the Supreme Court of the State of New Jersey was entered on the 12th day of May, 1965 (infra Appendix A, p. 51a). It is final by its terms. The jurisdiction of this Court is invoked under 28 U.S. Code 1257 (3).

Question Presented

1. Does not the fact that an incriminating statement was elicted by police from the defendant after he was indicted and while he was handcuffed and being brought from Pennsylvania to New Jersey, without the presence of counsel, and was admitted over the defendant's counsel's objection, and in addition that the defendant was not advised of his right to remain silent, deprive the defendant of his constitutional rights, and render the statement involuntary and warrant a reversal?

Statement of Facts

The defendant Edward Tiesi was indicted by the May Term 1962 Grand Jury in Cape May County for subornation of perjury as the result of a hearing which occurred in the Municipal Court of the city of North Wildwood on the 5th day of May, 1962. The indictment charges in essence that Edward Tiesi suborned one Harry Gallagher, who appeared as a witness for him, to testify falsely that he was operating his vehicle at 25 miles per hour and that Harry Gallagher was an occupant of Tiesi's vehicle at the time of his arrest for speeding in the City of North Wildwood (D1a-D3a).

The indictment was returned by the Cape May County Grand Jury on August 27th, 1962 according to the records of the county clerk.

In June of 1963 the defendant Tiesi was taken from the city of Philadelphia after an extradition hearing to Wildwood by Sgt. John Donnelly of the North Wildwood Police, Captain Louis Fiocca of the Wildwood Police, and in the company of Harry Gallagher, the witness he allegedly suborned to perjury in a police car (D8a-18 to D9a-34; D10a-37 to D12a-20; D13a-8 to D14a-10). While traveling in this police car the defendant made certain admissions and incriminating statements about his involvement with Gallagher which were repeated at the time of trial by Sgt. Donnelly (to whom defendant was manacled), Gallagher and Captain Fiocca. Objection to this testimony was overruled and a motion to strike the testimony was rejected by the court (D13a-15 to 40).

At the time of the police car interview the defendant had been indicted and of course did not have the benefit of counsel. The defendant entered a plea of not guilty to the indictment, charging

subornation of perjury, on the 13th day of September, 1963.

Jury trial was held on the within indictment before a Petit Jury of Cape May County on May 12th, 1964 and May 13th, 1964. The jury brought in a unanimous verdict of guilty on May 13th, 1964 (D44a-10 to 22).

Motion for new trial was made alleging that the verdict was against the weight of the evidence, was the result of partiality, prejudice and mistake, and the court erroneously refused to dismiss the indictment, prejudicially refused to charge defendant's original supplemental requests to charge, refused to charge on the effect of false swearing and conviction of the state's witness and the fact that the charge of the court was confusing, misleading and contradictory, was filed on May 18, 1964 (D45a) and by order, 19th day of June, 1964 was denied as well as the motion for arrest of judgment made orally at the same time (D47a).

On the 26th day of June, judgment of conviction was entered of the defendant and he was ordered and adjudged sentenced to New Jersey State Prison for a minimum of two years and a maximum of three years and was allowed $7500 bail pending the appeal (D48a). Notice of appeal was dated June 27, 1964 and was filed with the clerk of the County Court in accordance with the rules on June 30, 1964 and forwarded in due course to the Appellate Division of the Superior Court (D49a).

Defendant appeals from each and every aspect of the judgment of conviction and specifically alleges the admission of incriminating statements attributed

to him without assistance of counsel and of being advised of his right to remain silent, was in violation of his constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

I certify on my personal knowledge that the facts stated above are true.

David Perskie for
Perskie and Perskie

Reasons for Granting the Writ

The Admission of Incriminating Statements Made by the Defendant in the Presence of the Police Over Objection Violated His Constitutional Rights.

The record is quite clear from the testimony of Sgt. Donnelly of the North Wildwood Police Department, Captain Louis Fiocca, of the Wildwood Police Department and Harry Gallagher, the individual who was suborned to perjury that while being transported under handcuffs in a police car from the city of Philadelphia to Wildwood, as a result of an extradition hearing, the defendant Edward Tiesi was questioned by the police officers in the presence of Gallagher. During this questioning he made incriminating statements indicating that he was sorry for all the trouble that he had caused Gallagher and by inference sorry that he had caused Gallagher to lie.

These incriminating statements were admitted over the objection of defendant's counsel and were retained in the record after the denial of motion by defendant to strike the combined testimony of the three individuals to which objection had been previously made.

In one of the latest decisions of the Supreme Court of the United States there is contained this language:

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, Rogers v. Richmond, 365 U.S. 534 and even though there is ample evidence aside from the confession to support the conviction. Malinski v. N.Y., 324 U.S. 401; Stroble v. California, 343 U.S. 181; Payne v. Arkansas, 356 U.S. 560."

In the same case the court in commenting on the handling of the confession or admission before a New York Court which follows the same rule of procedure as the State of New Jersey, stated:

> "In those cases, where without the confession, the evidence is insufficient, defendant should not be convicted if the jury believes the confession, but finds that it would be involuntary." Jackson v. Denno, 378 U.S. 368 (1964).

Jackson v. Denno, supra, citing Rogers v. Richmond, 365 U.S. 534 further quoted with approval this language:

> "Where it was held that the reliability of a confession has nothing to do with its voluntariness, proof that defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overbourne.
>
> "It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions, not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive but also because of the strongly felt attitude of our society, important human values are sacrificed where an agency of the government in the course of securing a conviction brings a confession out of accused against his will. Blackburn v. Alabama, 361 U.S. 199. 206, 207 and because of the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much in danger from illegal methods used by those thought to be criminals as from the actual criminals themselves. Spano v. New York, 360 U.S. 315 (1959)."

The latter case also stands for the proposition that the jury may not use the assessment of truthfulness to assess voluntariness. In discussing New York procedure in handling a confession, the Supreme Court states:

> "It poses substantial threats to defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably deter-

mined. These hazards we cannot ignore." Jackson v. Denno, supra.

Spano v. New York, 360 U.S. 315 (1959), reversed a state conviction because a confession had wrongfully been admitted into evidence against the defendant at trial. The court held that defendant's conviction could not stand under the Fourteenth Amendment. The four concurring justices pointed out that the Constitution required reversal of the conviction on the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted and therefore at a time when he was clearly entitled to a lawyer's help.

In the recent decision of Massiah v. United States, 377 U.S. 201 (1964) (incriminatory statements taken through accomplice and recorded in automobile) the court adopted this language:

> "Ever since the Court's decision in the Spano case New York Courts have unequivocally followed this Constitutional Rule: 'Any secret interrogation of the defendant, from and after the finding of the Indictment, without the protection accorded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and fundamental rights of persons charged with crime.'" People v. Waterman, 9 N.Y.2d 561 (1961).
>
> "This view no more than reflects a constitutional principle established long ago." Powell v. Alabama, 287 U.S. 45 where the Court noted that "perhaps the most critical period of the

> proceedings . . . that is to say from the time of their arraignment until the beginning of their trial when consultation, thorough going investigation and preparation are vitally important the defendants are as much entitled to such aid (of counsel) during that period, as at the trial itself and since the Spano decision the same basic constitutional principles have been broadly reaffirmed by this Court. Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59; Gideon v. Wainwright, 372 U.S. 335 (1963." Massiah v. United States, supra.

In the case of Massiah v. United States, supra, it was held that the petitioner was denied the basic protections of the Fifth and Sixth Amendments when there was used against him at his trial evidence of his own incriminating words which federal agents had deliberately elicited from him after he had been indicted, in the absence of his counsel. It went on to quote this language:

> "If such a rule is to have any efficacy it must apply to indirect and surrepticious interrogation, as well as those conducted in the jailhouse."

In Escobedo v. State of Illinois, 378 U.S. 478 (1964) we find this language:

> "In Massiah v. U.S. this Court observed that a Constitution which guarantees a defendant the aid of counsel at trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely

> extrajudicial proceeding. Anything less... might deny defendant effective representation by counsel, at the only stage where legal aid and advice would help him." Quoting concerning decision of Justice Douglass in Spano v. United States, supra.

In the Escobedo case the interrogation was conducted before petitioner was formally indicted, whereas here the defendant had already been indicted. Escobedo deals with the obvious arguments that will be raised by the Attorney General with these words:

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the confession, will in the long run be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."

The court further stated:

> "We hold that whereas here the investigation is no longer a general inquiry into an unsolved crime but has begun to focus onto a particular suspect, and the suspect has been taken into police custody, and the police carry out a process of interrogation it lends itself to eliciting incriminating statements, and the suspect has requested and been denied an opportunity to consult with the lawyer, and the police have not effectively warned him of his absolute, constitutional right to remain silent, then the accused has been denied the assistance of counsel in violation of the Sixth Amendment to the Constitution which is made obligatory upon the States by the Fourteenth

> Amendment. Gideon v. Wainwright, 372 U.S. 335 at 342 (1963)and that no statement elicited by the police during the interrogation may be used against him at trial." Escobedo v. State of Illinois, supra.

In the New Jersey case of State v. Naglee, et al., 44 N.J. 209, 207 A.2d 689 (Sup. Ct. 1965) the Supreme Court of New Jersey was confronted with a challenge to an official interrogation on the basis that the statements given were involuntary and that the suspects were not advised of their right to counsel. Because of the fact that the defendants were police officials it was held that they were aware of their rights and need not have been advised of their right to counsel before making any statement.

The court said at 694 of Atlantic:

> "As a matter of common knowledge every official interrogation, no matter how civilly conducted, by its very nature tends to compel the person questioned to answer."

At 696 the court said:

> "While failure to advise a suspect of his right to counsel is an element to be considered on the issue of voluntariness of an inculpatory statement, the weight to be given this factor depends upon the circumstances of the interrogation."

In the case before this court Mr. Tiesi was not a police official and was not aware, nor was he made aware, of his right to counsel and his right not to testify against himself under the Fifth Amendment.

There is apparently little doubt in this case that the defendant while manacled and being brought from an extradition hearing in a police car by two hostile officers and in the presence of another convicted criminal who had obviously obtained leniency from the state (a $100 unpaid fine), in return for his testimony against the defendant, was subject to a rump court session. He was hardly in a position to defend himself, or make a request for counsel so he took the easiest way out under the circumstances. There was therefore elicited incriminating statements, without the advice of counsel at a critical stage of the proceedings, after the defendant had been indicted and where he was in a position wherein he could reasonably be expected to make some statements for his own well-being. The statements of defendant were repeated at trial by three separate state witnesses. To allow such statements to be brought into evidence, shocks the conscience and violates the fundamental constitutional provisions of this defendant.

Conclusion

It is therefore respectfully concluded that this Honorable Court should order the Supreme Court of the state of New Jersey to grant certiorari, thereby permitting argument before that court of the issues presented herein.

Respectfully submitted,

PERSKIE & PERSKIE,
Attorneys for Petitioner

By: DAVID PERSKIE

APPENDIX

INDICTMENT 140-61

MAY TERM 1962

NEW JERSEY SUPERIOR COURT
CAPE MAY COUNTY

The State of New Jersey
v.
Edward Tiesi,
Defendant.

The Grand Jurors, of the State of New Jersey, for the County of Cape May, upon their oaths, present, That EDWARD TIESI, on the Tenth day of May, 1962, in the City of North Wildwood, in the County of Cape May aforesaid, and within the jurisdiction of this Court, did willfully cause, procure and suborn willful perjury in manner and form following, to wit:

1. On the day aforesaid in the city and county aforesaid there regularly came on for trial in the Municipal Court of the City of North Wildwood, Honorable H. C. Lapidus, magistrate and judge of the said court presiding, a certain cause entitled "State of New Jersey vs. Edward Tiesi, defendant" on a Motor Vehicle Violation for Speeding, upon which trial evidence was given on behalf of the prosecution that the violation aforesaid was committed by the said Edward Tiesi during the hours of 10:45 p.m. and 11:00 p.m. on the Fifth day of May, 1962.

2. Before the said trial, to wit, between the Seventh day of May, 1962 and the Tenth day of May, 1962, in the Borough of Wildwood Crest in the county aforesaid, the said EDWARD TIESI, devising and intending to prevent the due course of law and justice and to cause and procure the said EDWARD TIESI to be acquitted and escape unpunished for the violation aforesaid, willfully, corruptly

and unlawfully did solicit, counsel, incite and persuade Harry Gallagher to appear as a witness for him the said EDWARD TIESI at the said trial and therein falsely and willfully to testify under oath that he the said Harry Gallagher was an occupant in the motor vehicle of the said EDWARD TIESI being driven at the speed of 25 m.p.h. at the time of the arrest of him the said EDWARD TIESI on the Fifth day of May, 1962, whereas in truth and in fact the said Harry Gallagher was not an occupant in the motor vehicle of the said EDWARD TIESI on the said day and time and the motor vehicle of the said EDWARD TIESI was not then and there being driven at the speed of 25 m.p.h., and whereas in truth and in fact, at the time when the said EDWARD TIESI so willfully, corruptly and unlawfully solicited, incited and endeavored to persuade the said Harry Gallagher to give such evidence upon his oath as aforesaid he the said EDWARD TIESI well knew that the said Harry Gallagher would not give his evidence according to the truth and that the same evidence so to be given was false, feigned and altogether fictitious.

3. In consequence and by the means, encouragement and effect of the willful and corrupt subornation and procurement of the said EDWARD TIESI, the said Harry Gallagher did attend the aforesaid trial and was then and there duly and regularly sworn as a witness for the said EDWARD TIESI, the said Harry Gallagher then and there taking oath that the evidence he should give to the magistrate trying the said cause should be the truth, the whole truth and nothing but the bruth, the said magistrate and judge thereof then and there having competent authority to cause such oath to be administered to the said Harry Gallagher in that behalf.

4. With reference to the matters under inquiry in the said hearing, and as so willfully and corruptly and

Indictment 140-61

unlawfully solicited, counselled, persuaded and caused by the said EDWARD TIESI as aforesaid, the said Harry Gallagher as such witness then and there before the said magistrate and judge falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence, among other things, in substance and to the effect following, that he the said Harry Gallagher was an occupant in the motor vehicle of the said EDWARD TIESI at the time of the arrest of him the said EDWARD TIESI on the Fifth day of May, 1962, being driven at the speed of 25 m.p.h.; whereas in truth and in fact he the said EDWARD TIESI, at the time of soliciting, counselling, causing, suborning and procuring the said Harry Gallagher willfully, intentionally, knowingly and falsely to swear as aforesaid, well knew that the said Harry Gallagher was not an occupant in the motor vehicle of the said EDWARD TIESI, on the said day at any time in the said day, nor was the motor vehicle of the said EDWARD TIESI being driven at the speed of 25 m.p.h.; contrary to the provisions of N.J.S. 2A:131-1, and against the peace of this State, the government and dignity of the same.

County Prosecutor

Endorsed:

Foreman

NOTICE OF MOTION
(Filed April 6, 1964)

TO: Prosecutor of Cape May County
Court House Building
Cape May Court House
New Jersey

PLEASE TAKE NOTICE that the undersigned

Notice of Motion

attorney for the named defendant will make application before the Superior Court at the Court House, Cape May Court House, New Jersey, on Tuesday the 7th day of April 1964 at 10:30 A.M. prevailing time, for an order to dismiss the above designated Indictments because of conflict of interest involved and because of the application of the principals enunciated in State vs. Detroit Motors, 163 A.2d 227; 62 N.J. Super. 386, Law Div. (1960). Attached hereto, and incorporated herein by this reference thereto is Affidavit upon which the undersigned will rely.

TAKE FURTHER NOTICE that at the time and place aforesaid the undersigned will also make application for such relief as the Court may deem just.

PERSKIE and PERSKIE
By /s/ Marvin D. Perskie
Marvin D. Perskie
Attorneys for Defendant.

Dated: April 1, 1964

AFFIDAVIT

STATE OF NEW JERSEY:
ss
COUNTY OF CAPE MAY:

Edward Tiesi being of full age, and duly sworn according to law upon his oath deposes and says:

1. During the trial of the motor vehicle violation out of which this indictment arises, I was represented by Henry Gorelick, Esq., an attorney of the State of New Jersey, who is now an assistant prosecutor of Cape May

Affidavit

County, New Jersey.

2. Mr. Gorelick also took an Appeal of the aforenamed violation for me, upon conviction.

3. On a prior occasion, Mr. Gorelick represented me with regard to a speeding ticket in the Borough of Wildwood Crest, Cape May County, New Jersey.

4. On another occasion, Mr. Gorelick represented me as a result of an accident I had in Franklin Township, New Jersey.

/s/ Edward Tiesi
Edward Tiesi

Sworn to and subscribed
before me this 26th day
of March, 1964

/s/ Marguerite B. Ellsworth
Notary Public of New Jersey
My Commission expires
Nov. 4, 1968.

ORDER
(Filed April 13, 1964)

This matter having been opened before the Court by Marvin D. Perskie, Esq., of the firm of Perskie & Perskie, Esqs., attorneys for the defendant, on Motion to Dismiss the above designated indictment, coming on to be heard in the presence of William J. Hughes, Assistant Prosecutor of Cape May County, and Argument having been heard by the court;

IT IS, on this 11th day of April, 1964, ORDERED

Order

AND ADJUDGED that the Motion to Dismiss the within indictment be denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Attorney General of New Jersey prosecute this matter on behalf of the State of New Jersey.

/s/ A.J. Cafiero
J.S.C.

NOTICE OF MOTION
(Filed May 6, 1964)

PLEASE TAKE NOTICE, that the undersigned will make application at the time of trial of the above-designated indictment for an Order dismissing the Indictment because of conflict of interest in the Prosecutor's Office of Cape May County which processed the Indictment, prepared same for trial, in view of the fact that the Assistant Prosecutor Henry Gorelick represented the defendant Edward Tiesi at the Motor Vehicle Hearing out of which the Indictment arises, and said counsel advised the party who was allegedly suborned to perjury, i.e. Harry Gallagher.

Attached to this Motion and incorporated herein is Affidavit of Attorney.

PERSKIE AND PERSKIE

By /s/ Marvin D. Perskie,
Attorney for Defendant.

Dated: May 5th, 1964.

AFFIDAVIT

STATE OF NEW JERSEY:
: ss.
COUNTY OF CAPE MAY:

MARVIN D. PERSKIE, of full age, and being duly sworn according to law, upon his oath deposes and says:

1. I am the attorney for the defendant Edward Tiesi. At a previous Motion argued in this cause it was represented to the court by the Assistant Prosecutor, Henry Gorelick that he personally represented the defendant Tiesi at the Motor Vehicle Hearing, out of which this present Indictment arises. He also indicated that he questioned the witness Harry Gallagher, who was allegedly suborned to perjury by the defendant Edward Tiesi in connection with this trial and presented him as a witness, and in addition to which gave him certain counsel with regard to the general subject matter of the charge here involved.

/s/ Marvin D. Perskie
Marvin D. Perskie

Sworn and subscribed to
before me this 5th day
of May, 1964.

/s/ Claribel F. Ludlam
Claribel F. Ludlam
Notary Public of New Jersey
My Commission Expires June 28, 1967

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS
May 12 and 13, 1964

(2)

SGT. JOHN DONNELLY:

DIRECT EXAMINATION BY MR. WALDRON:

Q. What is your official position, Mr. Donnelly?
A. Sergeant, North Wildwood Police Department.
Q. Were you a Sergeant in 1962? A. Yes, sir.

(9-11)

Q. Now after the disposition of the traffic case, did you participate at all in any other legal proceedings involving the defendant? A. Yes, sir, on the extradition case in Philadelphia. I had picked him up.

Mr. Perskie: I move that be stricken, and I would like to make a motion, if your Honor pleases.
The Court: Let me see Counsel at side bar.
(Motion made at side bar.)

By Mr. Waldron:

Q. How long were you in the company of the defendant on this occasion? A. Approximately seven hours, eight hours.
Q. And what would that date be on this occasion?
A. Twenty-first of June.
Q. What year? A. Sixty-two. Pardon me, '63.
Q. On June 21st, 1963, did you have a conversation with the defendant? A. Yes, sir.
Q. Where did that conversation take place? A. The conversation in the City Hall of Philadelphia, a conversation in the car coming back to Wildwood, and I had a

conversation with him in the diner on the way back to the car.

Q. Who was present during these conversations? A. Captain Fiocca and Harry Gallagher.

Q. What did the defendant state to you concerning his affairs?

Mr. Perskie: I object to that question because I think it's too broad, if your Honor pleases.

The Court: I will permit it.

A. He stated to me that he was sorry. Harry Gallagher was sitting in the front seat; I, Tiesi was in the back seat handcuffed with me; Captain Fiocca was driving the automobile. And he stated...

Mr. Perskie: I move this answer be stricken. It's not responsive.

The Court: All right, Mr. Attorney General, possibly you better derive the answers by detailed questioning.

Q. Who was present at the time of this conversation? A. Harry Gallagher, Captain Fiocca and myself.

Q. And the date again, please? A. June 21st.

Q. Year? A. Sixty-three.

Q. What did the defendant state to you concerning the matters in which you had a mutual interest? A. He said he was sorry it happened, and he was sorry he got Gallagher fouled up.

(24)

A. I therefore charged him with the motor vehicle violation. I went up to the hood of my vehicle; asked him for his registration and his owner's card; I questioned

him on the owner's card. It was a phony owner's card or different name.

Q. (Speaking to the Court) I move that be stricken. A. I made a ...

The Court: Just a minute, sir.
The Witness: I made a summons out.
The Court: No, I will permit it. Objection is overruled. You may continue.

(32)

Q. All right now, Mr. Gorelick presented the case for Mr. Tiesi, did he not? A. Yes, sir.

Q. And one of the witnesses that Mr. Gorelick presented was Mr. Gallagher? A. Yes, sir.

Q. And they both testified and you testified? A. Yes, sir.

(48)

CAPT. LOUIS C. FIOCCA

DIRECT EXAMINATION BY MR. WALDRON:

Q. What is your official capacity, sir? A. Police Captain in the City of Wildwood, New Jersey.

Q. Were you such a Police Captain in June of 1963? A. Yes, sir.

(50-53)

A. I was thinking of June 1962. If I may revise my answer, yes, in June of 1963 I was in the company of this defendant, and I did have lunch with him in a diner, yes. I was confused as to the date.

Q. Who else was in your company then? A. In my company at that time was Harry Gallagher, Sergeant John Donnelly of the North Wildwood Police Department.

Q. Were you the driver of the automobile? A. I was the driver of the automobile.

Q. Where was Mr. Tiesi seated? A. When we were driving, Mr. Tiesi would be seated in the rear seat to my right.

Q. Did you have a conversation with Mr. Tiesi? A. Yes.

Q. During the course of that drive? A. Yes, I did.

Q. Where did the drive originate? A. The drive originated from the parking lot adjacent to the City Hall at 15th and Market Streets.

Q. Where did it terminate? A. Terminated in Wildwood, New Jersey.

Q. Was it during that trip that you have your conversation with Mr. Tiesi? A. The ride from which Mr. Tiesi participated terminated at the Cape May Court House. I continued on to Wildwood.

Q. During the course of the ride did you have a conversation with Mr. Tiesi? A. I did.

Q. What did you say to him, what did he say to you? A. We began this ride at 15th and Market Streets, and Mr. Tiesi was very cordial to me and to the others in the car. He said he was ashamed of going back under these circumstances. We had to put handcuffs on him, and, of course, he didn't want to be seen. We allowed him to hold his hands in the proper position. When we crossed over into New Jersey, I asked ...

A. As we crossed into New Jersey, I asked the defendant if he was hungry, and had he anything to eat that day? He said he could eat, and I said, "Do you mind if we stop at a diner and get something to eat?" He said, "No, I don't mind. I could eat."

When we arrived at the diner, I asked him would he

care to have his cuffs taken off? Would he then do anything which would cause us to stop him if he might run away from us? He said, "No, I am all right." He said, "Take them off. I will do anything you tell me." And we discussed this problem in the car whereupon Sergeant Donnelly removed the handcuffs.

We entered the diner. Mr. Tiesi sat facing me. Then we discussed--I approached the subject to him. I said,"Mr. Tiesi, don't you think it was a little foolish of you to attempt to have Harry Gallagher tell these lies in that Coutt knowing this would happen?"

He said, "Well, I'm sorry it happened. I'm sorry for Harry Gallagher." He said, "I didn't mean to do it. I didn't think it would blow up like this. I am sorry about it."

(62-63)

HARRY GALLAGHER:

A. The morning that we were supposed to go to Court when Mr. Tiesi picked me up, and we went down to go to the lawyer. And before we went into the lawyer's office, then he told me what to tell the lawyer, which would be the same thing which would be said in Court.

Q. What did he tell you to tell the lawyer? A. That we were only going 25 miles an hour when we were stopped.

(64-67)

A. I told him that we were only going 25 miles an hour.

Q. Did you say that you were a passenger in the car?

Mr. Perskie: I object. That is leading.
The Court: Overruled.

Q. Did you state that you were in the car? A. Yes, sir.

Q. Were you in the car? A. No, sir.

Q. In June of 1963, did you hear a conversation between Mr. Tiesi, Sergeant Donnelly and Captain Fiocca? A. Yes, sir.

Q. And where were you at that time? A. I was in the car coming back from Philadelphia.

Q. What did Mr. Tiesi say about these various matters pending in this County?

Mr. Perskie: I object

Mr. Waldron: I will rephrase it, your Honor.

Mr. Perskie: No, no, you haven't heard the basis of my objection.

The Court: I will hear your objection.

Mr. Perskie: If your Honor pleases, it has already been established that at the time of this conversation Mr. Tiesi was manacled and was in a police car.

Mr. Waldron: I object. He wasn't manacled.

Mr. Perskie: Well, if I recall the testimony, he was manacled.

The Court: You present your argument.

Mr. Perskie: He was manacled. He was in a police car and in the presence of two policemen. And I submit that under the circumstances anything he said under those conditions is not a voluntary statement. And, therefore, I would object to it being pursued at this time, and I would move also to strike the testimony that was given by Officer Donnelly and Officer Fiocca with regard to this conversation.

The Court: Denied...

A. He said that he was sorry that he had caused everybody all this trouble.

Q. As a result of your actions in the Magistrate Court you were later convicted, were you not? A. Yes.

Q. That's all, your Honor.

CROSS EXAMINATION BY MR. PERSKIE:

Q. Mr. Gallagher, what were you convicted of? A. False swearing.

Q. You were convicted of false swearing? A. Yes.

Q. What was your fine? A. $100.00.

Q. What was the condition of that fine? A. What was the condition?

Q. Yes. Were you put on probation? A. Yes.

Q. One of the conditions of probation was that you were to make yourself available as a material witness against the defendant, isn't that so? A. Yes.

Q. Isn't that correct? A. That's right.

(68-69)

Q. Now, Mr. Gallagher, when did you first--well, strike that. When you appeared as a witness with Mr. Tiesi in the Municipal Court, his case was presented, was it not, by an attorney by the name of Henry Gorelick? A. Yes, sir.

Q. And did you have an interview with Mr. Gorelick? A. Yes.

Q. Before the case went on? A. Yes.

Q. And did you tell Mr. Gorelick that you were in the car? A. Yes.

Q. And that it was only going 25 miles an hour? A. Yes.

Q. And on how many occasions did you tell that to Mr. Gorelick? A. Once.

Gallagher - Cross

Q. And then Mr. Gorelick presented you as a witness in Court, did he not? A. Right.

(80-82)

Q. Mr. Gallagher, when were you first charged with having made a false statement? A. The day that the police came into work and arrested me.

Q. Do you know what day that was? A. I don't know the date.

Q. Do you have any idea when it was in connection with when you gave the statement? A. Possibly a month and a-half, two months later.

Q. Later? A. Yes.

Q. And you had a preliminary hearing, did you not? A. Yes.

Q. Who went with you at that preliminary hearing? A. Henry Gorelick.

Q. Now did you consult with Mr. Gorelick in regard to this offense that you were charged with? A. I had spoken to him. I don't remember any conversation.

Q. Did you tell him what--what did you tell him? A. He did all the talking.

Q. And did you tell him that you had made a false statement? A. No.

Q. You denied to him you had made a false statement? A. Yes.

Q. So that Mr. Gorelick--correct me if I am wrong--when this first happened, how old are you, sir? A. Thirty-two.

Q. You are 32. And you were about 30 or 31 when all this happened? A. Thirty.

Q. So correct me if I am wrong, when this first happened, you went to Mr. Gorelick and you told him you were in Tiesi's car going 25 miles an hour, is that correct? A. Yes.

Q. And when you appeared for your hearing, you testified under oath that you were in Mr. Tiesi's car and he was only going 25 miles an hour, is that correct? A. Yes.

Q. And after this hearing you subsequently told your own attorney when you knew there were charges against you that you were in the car and it was only going 25 miles an hour, isn't that correct? A. Yes.

Q. So at least on three occasions that I have enumerated, may have been more, you did not tell the truth, did you? A. That's right.

Q. Did you ever complain to your attorney, Mr. Gorelick, that Sergeant Donnelly threatened you? A. I told him about the papers that Sergeant Donnelly had given me.

Q. Did you tell your attorney that he slapped his holster and said: "You better change your statement"? A. I don't believe so.

Q. Well, did you or didn't you? A. I don't think so. I don't remember.

Q. You don't remember? That is all.

(84)

Q. Have you paid your $100.00 fine? A. No, sir.

Q. You haven't paid your $100.00 fine? A. Not all of it.

(86-92)

HENRY GORELICK:

DIRECT EXAMINATION BY MR. PERSKIE:

Q. Mr. Gorelick, directing your attention to May of 1962, did you at that time represent the defendant,

Edward Tiesi, in a motor vehicle charge in the City of North Wildwood? A. Yes, sir.

Q. Do you recall or do you have any evidence that would help you recall when you were hired to represent him in that matter? A. Not with respect to that particular matter. I had represented Mr. Tiesi generally for several months prior to that incident.

Q. That was in connection with his business affairs? A. No.

Q. In other matters in which he was involved? A. Yes, sir.

Q. Now, Mr. Gorelick, do you have any record when he first contacted you with regard to this specific charge in the City of North Wildwood? A. I have no record, no sir, but I do have an independent recollection.

Q. Well, what is the result of that independent recollection? A. I believe that I met him by chance on the evening when this occurred or shortly after it did occur, and he mentioned it to me.

Q. Do you remember how long after that occurred that the actual trial took place? A. I believe that I met him on the Saturday evening. I believe this occurred on a Friday or Saturday evening, and I met him that very evening. And I believe that the hearing on this particular charge was held on the following Thursday, which would be roughly five or six days later.

Q. Now did you have any consultations with the defendant in preparation for this trial? A. Yes, I did.

Q. Who is that? A. Harry Gallagher.

Q. What did Mr. Gallagher tell you with regard to this offense?...

By Mr. Perskie:

Q. Mr. Gorelick, what did Mr. Gallagher tell you about the motor vehicle offense in which Mr. Tiesi was

involved before the hearing in the City of North Wildwood? A. I believe that he reported to me that on the evening in question he was called by Mr. Tiesi from Zaberer's and asked by Mr. Tiesi to pick him up in Mr. Tiesi's car, and drive him from an affair that Mr. Tiesi was attending on that particular evening, and that he, Mr. Gallagher, did so; that he proceeded from his place of employment to meet with Mr. Tiesi at Zaberer's, and that he then returned toward the place of employment with Mr. Tiesi, Mr. Tiesi then driving the car and Mr. Gallagher sitting in the front seat with him.

Q. Did Mr. Gallagher tell you what speed they were going at? A. Yes, I believe Mr. Gallagher indicated to me that he had observed the speedometer at about 25 miles an hour.

Q. Now, how many conferences did you have with Mr. Gallagher before the motor vehicle hearing? A. My recollection is that there was only one on the day of the hearing, several hours prior to the hearing, which I believe occurred at 7 or 8:00 in the evening. I believe this conference was at about 4 or 5 that afternoon.

Q. Did you interview Mr. Gallagher in the presence of Tiesi, or was he alone? A. Mr. Tiesi was with him.

Q. Now after the hearing did you have any additional conference or discussions with Mr. Gallagher about this particular thing? ...

The Witness: Yes, I did.

Q. On how many occasions? A. I would say approximately three or four.

Q. Did he relate to you again what occurred on the night in question with regard to this offense? A. Yes.

Q. On how many of the occasions? A. I would say on each occasion that it was discussed.

Q. Now on these three or four occasions was he in the presence of Mr. Tiesi or was he alone? A. I think on several occasions he was alone. I am not certain. Mr. Tiesi might have been with him on several other occasions, but I did speak with him alone.

Q. On these occasions when he spoke to you alone, did he tell you anything different with regard to the offense than he told you on the first occasion? A. No.

Q. Did he any time ever tell you anything different with regard to the facts of this situation?

Mr. Waldron: Excuse me--"he" meaning whom?

Mr. Perskie: Harry Gallagher.

The Court: All right.

The Witness: No.

By Mr. Perskie:

Q. When is the last time that you had any contact with Mr. Gallagher? A. I believe it was either July or August of 1962...

Q. Did you represent Mr. Gallagher at his preliminary hearing in this matter? A. I believe I did.

Q. Do you remember when that was? Do you have any idea? A. No, I don't. I believe it was in either July or August of that year of 1962.

Q. Now up until the time--what plea did he enter at the preliminary hearing? A. I am not certain that a plea was taken, but if a plea was entered, it would have been not guilty.

Q. Did he tell you anything up to that time which in any way changed the story that he originally told you? A. No, he did not.

Q. Even though he was charged with false swearing, is that correct? A. That's correct.

Q. (Speaking to the Court) That is all. The rest I would like to take out of the presence of the Jury.

(93-95)

Q. Mr. Gorelick, when did you become a member of the prosecutor's staff? ...

Q. When did you become a member of the Cape May County Prosecutor's Office? A. During the middle part of January, 1963.

Q. Now, Mr. Gorelick, when did you first know that you were going to become a member of the office? When were you first informed? A. No more than a week before I was appointed.

Q. Now up until what time did you represent Gallagher on his false swearing matter? A. I don't recall. I would say this, I know that I did not represent him at the time he appeared to plead to the Indictment. And I had not seen him from the time that he appeared for the preliminary hearing. From then on I had not seen him nor discussed the matter with him.

Q. Now did you have any contract with Mr.Gallagher with regard to the proposed charges prior to the preliminary hearing? I am referring to the false swearing charge. A. May I clarify that?

Q. Yes. A. Since we are off the record. I don't believe I discussed or had any discussions with him once the complaint was issued. I did discuss the matter with him when he learned that it was under investigation.

Q. What did he tell you about the matter while it was under investigation? A. He told me that the story that he had told me...

Q. He repeated it? A. He repeated it, yes.

Q. Did he ever give you any indication whatsoever during your contract with him that he was not telling

the truth? A. No, he never told me that he was not telling the truth.

Q. That is all.

MOTION FOR DISMISSAL AT END OF STATE'S CASE

Mr. Perskie: At this time I would like to move for a Judgment of Dismissal of the indictment, and I would like to re-incorporate all motions I heretofore made--well, the only one I don't want to incorporate, of course, is the sequestration of the witness which was granted. I would like to incorporate the motions calling for the dismissal of the indictment because of the conflict of interest. I would like to re-incorporate the motion which calls for a dismissal because now all the facts are before the Court, that the charge is subornation to perjury, and it has also been shown that the alleged subornee was charged and convicted of false swearing. So I think the most that could be charged to this defendant would be suborning false swearing which, of course, is a much lesser offense than what he has been charged with at this time.

MR. WALDRON'S ARGUMENT

On the question of false swearing and perjury, it is the duty and obligation of the prosecutor to select the proper statute. And in the case of Harry Gallagher, he couldn't have been convicted of perjury because as the learned counsel pointed out, corroboration to the Nth degree is required. And in Harry Gallagher's case the prosecutor determined, and rightfully so, proceeded on false swearing, a misdemeanor as

against a high misdemeanor, a criminal case that requires a less--if I may say that--a less compelling degree of proof.

At any rate, it is the prosecutor's obligation to prepare the case under those statutes--different facts, different corroboration.

COURT'S RULING ON MOTION FOR DISMISSAL

The Court: No, I expressed my reasons yesterday. I think I have repeated them today. The basis of that motion is insufficient. That motion will be denied. I have expanded fully on the conflict of interest, and I see nothing that changes the same reasons I gave yesterday. That motion will be denied.

REQUESTS TO CHARGE

It is now respectfully requested that the Court instruct the jury as follows:

1. The indictment against the defendant is no evidence of guilt and carries with it no presumption of guilt. It is merely a complaint to let the jury and the defendant know what the charge is.

2. The jury is not to be influenced by the decision which the Court has made on any Motion during the course of this trial or any rulings concerning the admission of evidence, as these rulings do not import any opinion by the Court as to the guilt or innocence of the defendant.

3. The jury are the sole judges of the facts, the weight of the evidence and credibility of the witness.

Requests to Charge

4. The defendant is presumed to be innocent unless the crime charged, in each of its elements, is proved against him beyond a reasonable doubt, he is entitled to an acquittal. The burden of proving the defendant guilty rests upon the prosecution and never shifts.

5. The defendant is entitled to the presumption of innocence unless and until the jury agree upon a verdict of guilty upon consideration of all the evidence, and this beyond a reasonable doubt. (State v. D'Orio, E. & A. 1947, 137 N.J.L. 204; State v. Kisik, 99 N.J.L. 385, E. & A. 1924).

6. A person charged with crime is presumed to be innocent until proven guilty. This presumption abides with him through the trial. Therefore, when the jury go from the bar of the Court to their room to deliberate, they enter the jury room with the presumption of innocence still protecting the defendant. In the various mental conditions, ranging from that in which the jury think the defendant innocent to that in which they are convinced beyond a reasonable doubt of his guilt, he is entitled to the benefit of their uncertainty. (State v. Linker, 94 N.J.L. 411, 111 Atl. 35, E. & A. 1920; State v. Raymond, 53 N.J.L. 260, 21 Atl. 328, Sup. 1891.)

7. The presumption of defendant's innocence continues until overcome by proof establishing his guilt beyond a reasonable doubt. (State v. Burke, 81 N.J.L. 93, 79 Atl. 882, Sup. 1911; State v. Serlinsky, 115 N.J.L. 560, 181 Atl. 147, E. & A. 1935.)

8. The burden is upon the prosecution to prove the charge made in the indictment beyond a reasonable doubt and that burden never shifts. (State v. Lax,

71 N.J.L. 386, 59 Atl. 18, Sup. 1904; State v. Weiner, 101 N.J.L. 46, 127 Atl. 582, Sup. 1925; State v. Kaplan, 115 N.J.L. 374, 180 Atl. 423, Sup. 1935; State v. Vliet, 120 N.J.L. 23, 197 Atl. 894, Sup. 1938; State v. Giordano, 121 N.J.L. 469, 3 A.2d 290, Sup. 1939; State v. Lisena, 129 N.J.L. 569, affirmed per cur. 131 N.J.L. 39, A.2d 407, Sup. 1943.)

9. The defendant cannot be convicted unless he is proved to be guilty beyond a reasonable doubt. (State v. Ackerman, 62 N.J.L. 456, 41 Atl. 697, Sup. 1898; State v. Zimmer, 122 N.J.L. 154, 4 A.2d 82, Sup. 1939; State v. D'Orio, 136 N.J.L. 204, 51 A.2d 97, E. & A. 1947.)

10. The defendant is to be acquitted unless his guilt be proved beyond a reasonable doubt. If the jury are not satisfied beyond a reasonable doubt of the guilt of the defendant, he must be acquitted. (State v. Zimmer, 122 N.J.L. 154, 4 A.2d 82, Sup. 1939; State v. Faure, 98 N.J.L. 18, 119 Atl. 4, Sup. 1922.)

11. If upon a careful review of all the evidence, the jury have in their minds a reasonable doubt of the defendant's guilt, he must be acquitted. (Gardner v. State, 55 N.J.L. 17, 26 Atl. 30, Sup. 1892, affirmed per cur. 55 N.J.L. 652, 30 Atl. 429; Donnelly v. State, 26 N.J.L. 463, Sup. 1857, affirmed 26 N.J.L. 601; State v. Zimmer, 122 N.J.L. 154, 4 A.2d 82, Sup. 1939; State v. Faure, 98 N.J.L. 18, 119 Atl. 4, Sup. 1922.)

12. In a criminal prosecution it is not merely a belief in defendant's innocence, but it is the absence of a belief in his guilt so clear and strong as to exclude reasonable doubt, which requires his acquittal. In the

various mental conditions ranging from that in which the jury think the accused innocent, to that in which they are convinced beyond a reasonable doubt of his guilt, he is entitled to the benefit of their uncertainty. (State v. Raymond, 53 N.J.L. 260, 21 Atl. 328, Sup. 1891; State v. Linker, 94 N.J.L. 411, 111 Atl. 35, E. & A. 1920.)

13. A reasonable doubt may arise from the evidence presented or from the lack or want of evidence. (State v. Andrews, 77 N.J.L. 108, 71 Atl. 109, Sup. 1908.)

14. Criminal intent necessary to complete the crime charged against the accused must be proved by the prosecution beyond a reasonable doubt. (State v. Butler, 134 N.J.L. 122, 46 A.2d 380, Sup. 1946.)

15. It is the duty of each juror, while the jury is deliberating, to give careful attention and consideration to the views of his fellow jurors, and to discuss the facts with them. Each juror acts for himself and must reach his own judgment after discussion of the facts with his fellows. If, after such discussion and deliberation, a juror entertains a reasonable doubt of the guilt of the defendant, he must vote for an acquittal.

16. Evidence of the previous convictions of the defendant, Tiesi, must not be regarded by you as evidence tending to show the likelihood of his involvement in the present offense.

17. You must not regard evidence of the defendant's prior convictions as evidence tending to show he has committed the offense herein involved.

Requests to Charge

18. Evidence of prior convictions on the part of the defendant, Tiesi, may only be weighed and used against the defendant only as they tend to effect his credibility and not as evidence of his guilt of the present offense.

19. The defendant cannot be convicted of this offense unless the alleged act of subornation of perjury is corroborated by the State by proof of independent facts and circumstances which taken and considered together tend to confirm the testimony of Harry Gallagher. (State v. Ellison, 14 N.J.L. 237 (1935). In other words, the State must prove beyond a reasonable doubt that the testimony of Harry Gallagher referred to in the indictment was material to the issue, that it was perjured and that the State must corroborate the part of perjury by strong independent evidence.

20. Before the defendant, Tiesi, can be found guilty of subornation of perjury, you must find he induced one to swear falsely to material facts in the issue involved.

21. If the statement made by Gallagher, allegedly the basis of this prosecution, was a statement of honest opinion then there can be no conviction. (State v. Sullivan, 25 N.J.Super. 484.)

22. The State must prove beyond a reasonable doubt in order to convict the defendant, Tiesi, that Harry Gallagher actually committed perjury and his record of conviction is inadequate proof. (State v. Ellison, 114 N.J.L. 237 (1935).

23. The testimony of Gallagher in order to sustain the conviction of the defendant Tiesi must be established by proof beyond a reasonable doubt and it must

be supported beyond a reasonable doubt by proof of strong corroborating circumstances of such character as clearly to turn the scale and overcome the oath of the defendant, and the legal presumption of his innocence, something more than the mere weight of the evidence of the State. (State v. Caporale, 16 N.J. 373 (1954).

Respectfully Submitted,

PERSKIE AND PERSKIE

s/ Marvin D. Perskie,
Attorney for Defendant

COURT'S CHARGE TO THE JURY

(117)

...We have reached that point of trial of the case where it becomes my duty to instruct you as to the law that applies in the case, and it is your duty to accept the law as I shall state it to you and apply it to the facts as found by you. Just as I am the exclusive judge of the law, you are the exclusive judges of the facts, and you and you alone are the sole and exclusive judges of the facts. And if any facts were recalled to your minds or to your attention during summation by either counsel, or if I have alluded to certain facts in my charge to you which I presently do not contemplate making, then it is not my recollection nor is it counsel's recollection that you are to use in your deliberations. It should be your own recollection which is binding. Your determination of the issues in this case

must be based solely upon the evidence as you heard it from the lips of the witnesses and such documents as may have been introduced in evidence, and I don't believe there were any, and the law as I now instruct you.

Again I repeat, that the law makes you the sole judges of the facts, and you are to rely solely and entirely upon your personal recollection of the testimony no matter what I say or what either one of counsel may have said. You are to decide the credibility of the witnesses where there is any contradictory testimony, and there was some contradictory testimony in this case. You are to determine wherein the truth lies. And in so doing you will naturally take into consideration the interests of the persons who may have been called as witnesses and their general demeanor and actions while on the witness stand and the impressions that they created in your mind.

In your search for the truth you are to be guided by your plain every day common sense. You are persons of experience or you wouldn't be on this jury. You have seen the witnesses and you have heard the testimony, and it is for you to say who should be believed and to what extent. Your own judgment as men and women of experience and affairs should assist you in materially making this determination. And in arriving at your conclusion you may also consider any testimony as to inconsistent statements or omissions made by any witness upon the stand or upon any other occasion.

I am going to again, ladies and gentlemen, read the Indictment in this case that was read to you at the opening by the State...

Court's Charge to the Jury

The statute which is referred to in the Indictment, ladies and gentlemen, concerns perjury and subornation of perjury. Subornation means the inciting or causing another to commit the crime of perjury. The statute reads as follows:

"Any person who willfully and corruptly commits perjury or by any means procures or suborns any person to commit corrupt and willful perjury, on his oath, in any action, pleading, indictment, controversy, or before a referee or arbitrator, or any deposition or examination taken or to be taken pursuant to the laws of this State or the rules of the Supreme Court of this State, before any public officer legally authorized to take the same, is guilty of a high misdemeanor."

Now, ladies and gentlemen, the elements of this offense generally are that if that perjury were committed and that the defendant, Edward Tiesi, suborned such a perjury, it is necessary for the State to establish that. I will elaborate on that. It is necessary to first prove that perjury was committed, then it is necessary for the State to prove that such a perjury was suborned. In short, that is, the perjury was committed by Harry Gallagher at the magistrate proceeding in North Wildwood and that such perjury was suborned by the defendant, Edward Tiesi.

To constitute a perjury, ladies and gentlemen of the Jury, the State must first of all establish it was the type of a proceeding comprehended by the statute. And I charge you as a matter of law that the type of proceeding taken place on May the 10th, 1962 in North Wildwood City Hall was a proceeding as contemplated by the statute.

In addition, the falsehood must be made after

the witness has been sworn and taken the oath. The magistrate in the City of North Wildwood, and I charge you as a matter of law, is a person impowered to take testimony and to administer that oath.

Having appeared in such a judicial proceeding and having been administered the oath, the State is then bound to prove that Harry Gallagher willfully and corruptly stated a falsehood as to a material fact willfully and corruptly.

Willfully under our statute and in this instance means simply intentionally, knowing the same to be false. Corruptly means for a fraudulent purpose.

The matters of fact which is testified to, ladies and gentlemen of the Jury, must be able to sustain a perjury conviction. I charge you as a matter of law that the facts related by the State, one, that the subornation consisted of having the said Harry Gallagher testify that he was an occupant of the vehicle, and two, the vehicle was proceeding at 25 miles an hour.

I charge you that each of these facts as a matter of law were material to the proceeding taking place in the North Wildwood City Hall. The materiality of those statements is a matter for the determination by the Court and not by the Jury, and I so charge you.

It must be established by the State that the testimony of Harry Gallagher was incited, solicited, counseled and persuaded by Edward Tiesi. In short, that Edward Tiesi contacted the witness Gallagher and procured from that witness the actions consisting of his testimony in the Magistrate Court which comprised a perjury and which comprised subornation of such

a perjury, and this was the corrupt motive and the intent on the part of Edward Tiesi to avoid a conviction in the Magistrate Court of the charge of speeding, that is, to obtain an acquital, (sic) and secondly, to obstruct the due course of justice.

Now, ladies and gentlemen of the Jury, in an indictment for perjury in order to sustain a conviction for perjury and in order to obtain a conviction for the crime of subornation of perjury, it is necessary that more be adduced by way of evidence by the State than the testimony of a single witness. The crime is in some respect unique in this regard. The testimony necessary to be adduced by the State in addition to any single witness is corroborating testimony, corroboration of each of the elements as I have defined them to you. Corroboration required to prove perjury or subornation of perjury is proof of independent facts or circumstances which taken and considered together can in conformation of the testimony of a single witness to establish the falsity of the oath, that is to say, the falsehood. So there must be corroboration as to each and every element in this case.

It is then for your determination, ladies and gentlemen, first of all to determine, one, whether or not there was the judicial proceeding. I have characterized a magistrate hearing for the purpose of speeding violations as a judicial proceeding. You will first of all determine whether or not that proceeding was held on May the 10th; (2) whether or not Judge Lapidus presided at that hearing; (3) whether or not he administered the oath as he testified to the witness Gallagher;

(4) whether or not the testimony as given by the witness Gallagher was to the effect that he wasn't an occupant of the vehicle, and two, as to the speed of 25 miles an hour. Then you must further determine that the defendant Tiesi did not have as an occupant of his car the witness Gallagher, and that the defendant Tiesi at the time of his arrest by Officer Donnelly was not proceeding at the speed of 25 miles an hour or thereabout.

May I say in that regard that for the testimony to be false, it must be a statement of fact rather than a statement of opinion. So that in the ordinary course of events estimation of speed could well be a statement of opinion.

Now the fact that the defendant has been indicted is not evidential as to his guilt, as he, like all others, is presumed to be innocent until proved guilty beyond a reasonable doubt. An indictment is merely a formal complaint charging a person with the commission of crime. The grand jury in returning an indictment hears only one side of the case, that is, the State's case. It is your function as a petit jury to hear both sides, as you have done at this trial, and to determine the guilt or innocence of the defendant.

Now, the burden of proof is upon the State to satisfy you beyond a reasonable doubt as to the guilt of the defendant. The defendant does not have to prove his innocence, as he is presumed to be right up until the time you go into the Jury room. He is presumed to be innocent until proven guilty beyond a reasonable doubt. This burden which the State has at no time shifts.

Now, in this connection the Court directs

your attention to the fact that the law surrounding perjury and subornation of perjury must be observed. All laws must be observed, and it is not for the Court not the Jury to say that this or any other law should not be enforced. And just as it is your bounden duty under the solemn oaths you have taken to acquit this defendant if the State has failed to prove him guilty beyond a reasonable doubt, equally so you must find him guilty if the State has carried the burden of proof and established his guilt beyond a reasonable doubt. This is necessarily so and vitally important, because the failure on the part of the Court or Juries to enforce one law leads to the flagrant violation of other laws, thus undermining the morals and order of the State and the general safety of the life and property of the people.

Now, as I have used the term reasonable doubt in the course of these instructions, our courts are required to define this term in every criminal case. The State must prove the defendant guilty beyond a reasonable doubt, but it does not have to prove him guilty beyond any doubt whatsoever. Reasonable doubt is not a mere possible doubt, it is rather that state of the case which after an entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

If, therefore, after you have entirely compared and considered all the evidence in this case, your minds are left in that condition that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge,

then you have what the law calls a reasonable doubt, and it is your duty to give the defendant the benefit of such a reasonable doubt and to acquit him, and such a doubt may arise out of the lack of evidence. However, on the other hand, if you have an abiding conviction to a moral certainty he is guilty, your minds may be said to be free from a reasonable doubt of his guilt, and it would be your duty to convict him.

There has been some testimony in this case, ladies and gentlemen, of prior convictions of the defendant Tiesi. I would charge you that evidence of prior convictions on the part of the defendant, Tiesi, may only be weighed and used against the defendant only as they tend to effect his credibility and not as evidence of his guilt of a present offense. It may be used by you, ladies and gentlemen in determining the degree of credibility you wish to attach to the statements of Mr. Tiesi. They may not be used by you as substantive proof of conviction of the present offense.

A person charged with a crime is presumed to be innocent until proven guilty. This presumption abides with him throughout the trial. Therefore, when the Jury go from the bar of the Court to their room to deliberate, they enter the Jury room with the presumption of innocence still protecting the defendant. In the various mental conditions, ranging from that in which the Jury think the defendant innocent to that in which they are convinced beyond a reasonable doubt of his guilt, he is entitled to the benefit of their uncertainty.

Now, ladies and gentlemen, you are to consider the interests of the various witnesses in

the outcome of the case, the character of the testimony, and the manner in which it was given by each witness that appeared before you. You must consider whether any witness attempted to color his testimony and whether his testimony was credible. And as I have said, you are the sole judges of the facts and the credibility of the witnesses. I must remark to you that you should remember that it is not the quantity, but rather the quality of the evidence which should influence you.

It is the function of the Court, as I have said, to rule on all questions of law, including motions and the admissibility of evidence, and to instruct you as to the rules of law which you must apply to the evidence. It is your duty to follow and obey these instructions, but, however, as to the rulings made by the Court, these have no bearing whatever as to the defendant's innocence or guilt. I mentioned that before in terms of attaching no significance one way or another as to the result of any rulings I may have made. As I said before--you have heard it stated before by the Court--the Courtroom is no place for sympathy, passion or prejudice. It is your duty to search through all the testimony until you are satisfied you have reached a correct conclusion, and you should return to this Courtroom with your verdict feeling that you have fully discharged your duty as a citizen and Juror in accordance with your oath without fear or favor and upon the evidence produced in the Courtroom.

I have been requested to charge--just a minute, sir. I have been requested to charge certain instructions to the Jury. The Court declines

to charge number one of the defendant's requests. I have charged number two. I decline to charge three and four. Five I have charged. Six I have charged. Seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, insomuch as I believe, these were set forth satisfactorily in the Court's charge, and it would be surplusage. I will charge fifteen. I have charged in essence sixteen and seventeen. I charged specifically request number eighteen. I decline to charge nineteen, twenty, twenty-one, twenty-two and twenty-three.

Are there any other matters with respect to requests of charge, gentlemen? Will you please come to the bench. (The following taken at side bar:

The Court: There has been produced nine supplemental requests to charge. The Court declines to charge each of the nine requests.

I think the record should reflect the supplemental requests were handed to me in handwritten form at the conclusion of the Court's charge.

Mr. Perskie: I would like to also show before the Jury retires that these charges were necessitated in the opinion of defense counsel by the contents of the charge as directed to the Jury by the Court.

The Court: All right.)

The Court: Now, ladies and gentlemen of the Jury, Court's exist for the judicial determination of the rights of individuals and for the administration of justice. A trial is not intended to be a game of skill, but it is an inquiry into the truth in order that justice may be done. It is of the utmost importance that public confidence

in the jury system be maintained, and in the efficient administration of justice every jury verdict should be the reasoned and logical result of the concrete application of the law to the facts. I want to say to you most strongly that you should realize that you are performing one of the highest functions of American citizenship, that while you are deliberating upon this case you are the most important part of this Court. Let your verdict be based on the evidence and the law which I have charged you, and let it be uncolored by sympathy, bias, prejudice, or improper or illegal influence.

Now, ladies and gentlemen, with reference to your verdict, some reference has been made to the fact that you will sit in civil trials. You are now sitting in a criminal trial. The actions of the Jury are different in some respect in each case. In a criminal trial your verdict must be unanimous. You can return to the Courtroom only when all twelve of you agree as to whether the verdict should be not guilty or guilty, and the form of the verdict will be as I have indicated--guilty or not guilty, and it will be based upon only a unanimous verdict.

Now, ladies and gentlemen, I have been requested, and I will charge to you, that it is the duty of each Juror, while the Jury is deliberating, to give careful attention and consideration to the views of his fellow Jurors, and to discuss the facts with them. Each Juror acts for himself and must reach his own judgment after discussion of the facts with his fellows. If, after such discussion and deliberation, a Juror entertains a reasonable doubt of the guilt of the defendant, he must vote, or she must vote, for an acquital. (sic)

Court's Charge to the Jury

Now, in conferring together you should pay proper respect to each other's opinions and examine such differences in the spirit of fairness and candor. Now, this does not mean that any member of the Jury shall yield his well-grounded opinion to violate his oath, but it does mean that he shall not stand out in an unruly and obstinate way through mere stubbornness. Members of the Jury should always scrutinize the facts from their own standpoint and the viewpoint of their fellow members, and while undoubtedly the verdict of the Jury should represent the opinion of each individual Juror, it is (sic) by no means follows that opinions may not be changed by conferences in the Jury room. The very object of the Jury system is to reach a conclusion by comparison of views. A Juror should listen with deference to the arguments of his fellow Jurors, and with distrust of his own judgment if he finds the large majority of the Jury taking a different view of the case than that which he or she may hold themselves.

Gentlemen, I will hear legal matters prior to sending the Jury out for deliberation. I will ask the Jury to be excused, not for deliberation, but to go to the Jury room temporarily.

(The Jury retires to the Jury room.)

Mr. Perskie: If your Honor pleases, I would like to object to the failure of the Court to charge in the language I have given it, my Requests to Charge, one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, nineteen, twenty, twenty-one, twenty-two, twenty-three.

Mr. Waldron: May I have a copy, please?

Mr. Perskie: I'm sorry.

Court's Charge to the Jury

The Court: I would like to say at the outset, I charged verbatim number two. I don't know whether you mentioned eighteen?

Mr. Perskie: I didn't mention eighteen.

The Court: I charged verbatim number fifteen.

Mr. Perskie: Fifteen you did charge that verbatim.

The Court: All right.

Mr. Perskie: If your Honor pleases, I have some objections to the charge which I think are most important. In addition, I have asked the Court to. . . . .

The Court: I have ruled on those supplemental charges. I don't want to hear any further arguments on that. I will grant your exceptance. They will be designated as supplemental requests.

Mr. Perskie: One, two, three, four, five, six, seven, eight and nine supplemental charges.

I have been involved in prior litigations where the opposing counsel made objections because I didn't specifically state the grounds for my objections.

I just object to your failure to charge, so with your Honor's indulgence now, in supplemental charge number one, I have asked you to charge that the jury is to disregard the evidence of the defendant's motor vehicle violation, and is not intended to show his guilt to the charge made herein.

Now this was gone into by the Attorney General as to the facts of the prior motor vehicle hearing which I feel is prejudicial. The failure to charge that will result in prejudice to the defendant.

And I also ask the Court to charge that the

State must prove beyond a reasonable doubt that not only that Gallagher committed perjury, but that the subornation was accomplished beyond a reasonable doubt.

Now Gallagher pleaded guilty to false swearing. This cannot help having an effect on the jury. I have asked the Court to charge false swearing is not perjury because they are liable to take it that his plea of guilty to false swearing is perjury, and the Court refused to charge that, and I also put it in a little different way.

Then I have asked the Court to charge, supplemental charge five, that the conviction of false swearing of Gallagher cannot be seen by the jury as equivalent to a conviction of perjury. I think there is a real danger of that in this case.

Now I don't think the Court with all due respect has brought out sufficiently that the corroboration required of the perjury must be of strong and independent evidence, and the Court did not use that, and that is the language used by the cases, unless I missed it. I was busy writing while the Court was charging. The corroboration must be strong and independent, and I don't believe that that was charged.

Now, also, the indictment refers to the oath given by Judge Lapidus, and I was amazed by this, probably something I overlooked at the trial, that the oath given by Judge Lapidus was that the witness would tell the truth, the whole truth, nothing but the truth. Whereas the Court when he came here and testified that his oath was that do you solemnly swear that the proceedings before me you will tell the truth, not the whole truth, nothing but the truth, but the

truth. It wasn't done with that detail. And, therefore, I don't think it's sufficient to sustain the prosecution here.

And I also wanted the Court to charge that the defendant, Tiesi, conviction of this offense should not necessarily be accepted by the jury as evidence that his testimony there was false. Because they are liable to say he was convicted there, that means the testimony is false. And that conviction cannot be accepted by the jury as that.

The last thing, the Court properly charged that testimony as to speed is opinion evidence, and I want the court to charge as a matter of law since Gallagher said the only thing he was solicited to do by Tiesi was to state that he wasn't violating the speed limit. He gave us his opinion that he was not violating the speed limit. So since the only thing that was solicited was a matter of opinion, therefore, there cannot be a conviction. And I ask the Court to charge that in my supplemental charge nine.

And the Court also charged as a matter of law, and it charged that the 25 mile per hour as a matter of law is a material element in the case. In a recent decision by the appellate division the mileage is not essential, and it's not material, the question whether he was violating the speeding law or not. When you told the jury that 25 miles an hour was a material element, I think that was highly erroneous and prejudicial.

I think that is the bases of my objections.

The Court: Very well.

Mr. Perskie: Can I have the Court Clerk mark these so they may be available?

Court's Charge to the Jury

The Court: Any objections?

Mr. Waldron: No, your Honor.

The Court: Bring the jury back in, if you will, please.

(Jury returns to the Courtroom.)

The Court: Ladies and gentlemen of the Jury, let me occupy just a few more moments of your attention. It has been called to my attention that I may have failed to instruct you that the burden of proof beyond a reasonable doubt extends to the commission of the entire offense which is charged to the defendant, Tiesi. Now I indicated that before the defendant, Tiesi, could be convicted of the crime of subornation of perjury, you must first find that the perjury was committed, and I indicated that the burden of proof to establish perjury was the burdenor (sic) proof beyond a reasonable doubt.

I instruct you that the burden of proof in the entire case is beyond a reasonable doubt, and that would include, of course, the burden of proof beyond a reasonable doubt that the subornation took place in addition to the commission of the perjury. In short, the burden of proving beyond a reasonable doubt not only extends to the perjury, but it covers the subornation as well. It covers the entire State's case.

I have indicated to you that the speed of the vehicle as indicated in the indictment at 25 miles an hour was a material fact as a matter of law. The testimony as to the truth or falsity of the speed of this vehicle, ladies and gentlemen, was a material fact. It is not necessarily material that it was exactly 25 miles per hour.

The testimony of the witness Gallagher as adduced by the State as to the speed of the vehicle

was a material fact insofar as it related to any violation of the speed laws of the municipality, and I instruct you that is in due regard to the instructions I gave you relating to matters of opinion.

I wish finally to instruct you that the fact that the defendant, Edward Tiesi, was in fact convicted in the Magistrate Court of speeding is not to have effect. You are not to assume since he was convicted of speeding in the Magistrate Court that that automatically is warrant to a conviction that he was lying. The conviction for speeding in a Magistrate Court on May the 10th was to have absolutely nothing to do with your deliberation one way or the other.

All right, Mr. Clerk, if you will swear the attendants.

Mr. Perskie: I want to respectfully object to the additional charge.

Number one, you charged about five times that the burden beyond a reasonable doubt goes to the whole case, which you never mentioned once whose burden it was, the State's or defendant's.

Secondly, you said that the evidence of conviction in the motor vehicle hearing is not evidence that the defendant Tiesi was lying. He was not charged with lying. He is charged with subornation of perjury.

The Court: Before you are excused, in considering the conviction of the defendant, Tiesi, at the Magistrate hearing, that is not indicative that any one at that proceeding was lying or that anyone was suborned. The result of the determination in the Magistrate proceeding is to have no bearing on this case whatsoever.

Court's Charge to the Jury

I thought that I instructed you quite clearly that the burden of proof rests with the State, and that that burden calls for proof beyond a reasonable doubt. The burden of proof beyond a reasonable doubt rests with the State, and at no time shifts.

All right, swear in your officers.

(Court attendants sworn by the clerk.)

The Court: All right, the Jury may be excused to deliberate.

(Jury retires at 3:25 P.M.)

(Jury returns to the Courtroom at 3:55 P.M.)

(Roll call of the Jurors taken by the clerk.)

The Clerk: Have you agreed upon your verdict? Who shall say for you? Madam Forelady, how say you, do you find the defendant guilty or not guilty?

Madam Forelady: We find the defendant guilty.

The Court: You find the defendant guilty and so say all of you?

Madam Forelady: Yes.

Mr. Perskie: May I have the Jury polled?

The Court: Have the Jury polled, please.

(Jury polled by the clerk.)

NOTICE OF MOTION FOR NEW TRIAL

(Filed May 18, 1964)

TO: PROSECUTOR OF CAPE MAY COUNTY
Court House
Cape May Court House, N. J.

JOHN A. WALDRON, ESQ.
Deputy Attorney General
State House Annex
Trenton, New Jersey

PLEASE TAKE NOTICE that the undersigned will make application to the Superior Court of New Jersey, Criminal Division, Cape May County, at the Court House, Cape May Court House, on Friday, May 29th, 1964 at 9:30 A.M. in the forenoon, or as soon thereafter as the matter can be heard, for a new trial in the above-designated matter, based on the following reasons:

1. The verdict was against the weight of the evidence.

2. The verdict was the result of partiality, prejudice and mistake.

3. The court erroneously failed to dismiss the Indictment at the inception of the case, at the end of the State's case, at the end of the entire case, on the basis of conflict of interest and on the further basis that the acceptance of the plea by the State for false swearing of Harry Gallagher, prohibited the obtaining of a conviction for subornation of perjury.

4. In addition the court erroneously and prejudicially refused to charge defendant's original and

supplements requests to charge.

5. The court prejudicially refused to charge on the effect of the false swearing conviction of the State's witness, Harry Gallagher.

6. The charge of the court was confusing, misleading and contradictory.

PERSKIE AND PERSKIE

By: /s/ Marvin D. Perskie
Marvin D. Perskie,
Attorney for the Defenda

ORDER
(Filed June 22, 1964)

This matter, having been opened before the court by Marvin D. Perskie, of the Firm of Perskie and Perskie, and coming on to be heard in the presence of John A. Waldron, Deputy Attorney General of the State of New Jersey, and argument having been duly heard on all the grounds contained in Motion for Mistrial of the Defendant, and also the argument on Motion for Arrest of Judgment having been duly considered;

IT IS, on this 19th day of June, 1964 ORDERED AND ADJUDGED that the Motion for a New Trial and Motion for Arrest of Judgment made by the defendant be and is herewith denied.

/s/ George B. Francis
J. C. C.

JUDGMENT OF CONVICTION

(Filed June 29, 1964)

The defendant, having been indicted herein by the Grand Jury of Cape May County, May Term of 1962, under Indictment No. 140-61, and the said defendant Edward Tiesi being represented by Counsel having entered a plea of Not Guilty to said Indictment on the 13th day of September, 1963; and the matter coming on to be heard before a Petit Jury of Cape May County on May 12th, 1964 and May 13th, 1964 and the Jury having entered a unanimous verdict of guilty on May 13th, 1964 and the defendant appearing after pre-sentencing investigation before the New Jersey Superior Court, Criminal Division on June 19, 1964 for sentencing and being represented at that time by Marvin D. Perskie of the Firm of Perskie and Perskie and Deputy Attorney General John A. Waldron appearing for the State of New Jersey;

IT IS, on this 26th day of June, 1964 ORDERED AND ADJUDICATED that the defendant Edward Tiesi is guilty of subornation of perjury, as having been convicted of this offense as alleged in Indictment No. 140-61 of the Grand Jury, Cape May County, May Term of 1962, and

IT IS FURTHER ORDERED and ADJUDGED that he be sentenced to the New Jersey State Prison for a minimum of two years and a maximum of three years.

IT IS FURTHER ORDERED and ADJUDGED that defendant be afforded bail in the amount of $7500.00 pending the Appeal of this conviction in due course.

/s/ Geo. B. Francis
Acting J.S.C.

NOTICE OF APPEAL

(Filed June 30, 1964)

Notice is hereby given that the defendant, Edward Tiesi, appeals to the Superior Court of New Jersey, Appellate Division, from the whole of the Final Judgment of Conviction of the Superior Court, Cape May County, Criminal Division entered on June 26th, 1964, in favor of the State of New Jersey against the defendant, Edward Tiesi, and by said Judgment sentencing the said defendant to a minimum of two (2) and a maximum of three (3) years in New Jersey State Prison as a result of his conviction for Subornation of Perjury under indictment #140-61, Cape May County Grand Jury May Term of 1962.

DATED: June 27, 1964 PERSKIE AND PERSKIE

By: s/ Marvin D. Perskie
Marvin D. Perskie,
Attorney for Defendant

I hereby certify that on June 25th, 1964, I complied with the requirements of R. R. 1:2-8(e).

PERSKIE AND PERSKIE
By: s/ Marvin D. Perskie
Marvin D. Perskie
Attorney for Defendant

Mandate on Affirmance

This cause having been duly argued before this Court by Marvin D. Perskie, counsel for the appellant and John W. Hayden, Jr., counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Cape May County Court is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Cape May County Court to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 2nd day of March, 1965.

Mortimer G. Newman, Jr.
Clerk of the Superior Court

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

s/ Mortimer G. Newman, Jr.
Clerk

Opinion

Argued February 23, 1965 - Decided March 2, 1965

Before Judges Foley, Goldman and Collester

Mr. Marvin D. Perskie argued the cause for appellant (Messrs. Perskie & Perskie, attorneys).

Mr. John W. Hayden, Jr., Deputy Attorney General, argued the cause for respondent (Mr. Arthur J. Sills, Attorney General of New Jersey, attorney).

PER CURIAM

Defendant appeals from a conviction of subornation of perjury. We have examined the entire record and have fully considered the briefs and the oral arguments presented to us. We are of the opinion that none of the points raised by the defendant is of sufficient substance to constitute ground for reversal. See R.R. 1:5-1(a).

Affirm.

Notice of Petition for Certification

Notice is hereby given that the defendant Edward Tiesi, will petition the Supreme Court of New Jersey for Certification to the Appellate Division to review the entire final judgment of the Appellate Division entered in favor of the plaintiff in this action on March 2nd, 1965 and particularly on the grounds of conflict of interest and the violation of Defendant's Constitutional rights.

Defendant reserves the right to apply by appropriate Motion to the Appellate Division for an Order Granting a Stay of the Imposition of Sentence.

PERSKIE AND PERSKIE

By s/ Marvin D. Perskie
Marvin D. Perskie, Attorney
for Defendant

Order Denying Petition

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 12th day of May, 1965.

s/ John H. Gildea
Clerk of the Supreme Court

Filed May 12, 1965
John H. Gildea
Clerk

A TRUE COPY
s/ John H. Gildea
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 436

EDWARD TIESI,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Respondent,
State House Annex,
Trenton, New Jersey.

JOHN W. HAYDEN, JR.,
Deputy Attorney General,
Of Counsel and on the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Other Authority Cited

Websters 7th New Collegiate Dictionary, definition, "elicited":

p. 268 10

Counter-Statement of Questions Presented

1. Did the admission into evidence of remarks voluntarily made by defendant during general conversation in an automobile trip and at dinner in a public diner, that he was sorry he had caused certain trouble, violate his constitutional rights?

2. May defendant complain of the admission of testimony concerning incriminating remarks he made to witnesses, where he failed to object to this testimony from the first two out of three witnesses, failed to request the court to charge the jury to disregard the testimony and failed to include their admission as error in his motion to dismiss at the end of the trial or in his motion for new trial after conviction?

3. Should defendant's petition be granted when he has continuously failed to comply with the Rules of this Court relating to Jurisdiction on Writ of *Certiorari*?

Counter-Statement of Facts

Defendant, Edward Tiesi, was indicted for subordination of perjury by the May Term 1962 Grand Jury in Cape May County, New Jersey (D1a). The indictment charged that defendant suborned one Harry Gallagher to falsely testify at a Municipal Court hearing in connection with a motor vehicle violation.

On June 21, 1963, the defendant, Tiesi, was returned from Philadelphia to Cape May County, New Jersey, after an all day extradition hearing. He was transported in a car in which Sgt. John Donnelly of the North Wildwood Police Department, Captain Louis C. Fiocca of the Wildwood Police Department and the suborned witness, Harry Gallagher, were also passengers. Cpt. Fiocca testified that he drove the vehicle containing defendant and the others from City Hall in Philadelphia to the Cape May courthouse (P30a-12 to 34). He described defendant as being very cordial to himself and the others (D11a-20). As they crossed into New Jersey, Cpt. Fiocca asked Tiesi if he was hungry and had he had anything to eat that day. "He said he could eat and I said, 'Do you mind if we stop at a diner and get something to eat?' He said, 'No, I don't mind, I could eat'." (D11a-30). When they arrived at the diner the Captain offered to take off the handcuffs if defendant promised not to run away, and when Tiesi agreed, Sgt. Donnelly removed the handcuffs (D12a-10). As they sat in the diner talking Cpt. Fiocca remarked "Mr. Tiesi, don't you think it was a little foolish of you to attempt to have Harry Gallagher tell these lies in that Court knowing this would happen?" (D12a-12). Whereupon defendant replied, "Well, I'm sorry it happened. I'm sorry for Harry Gallagher." and "I didn't mean to do it. I didn't think it would blow up like this. I am sorry about it" (D12a-15).

Thus, defendant was not "manacled" as described by counsel in his petition for *certiorari*, and the remarks he made which are the subject of this petition, were purely voluntary in the course of discussion during dinner at a public diner. Counsel for defendant made no objection to the line of questioning concerning the statement by defendant during Cpt. Fiocca's testimony, except that the officer was bringing in extraneous matters, (portion of transcript omitted by petitioner). This failure to object was despite the fact that Sgt. Donnelly had testified earlier in the trial to a similar statement by Tiesi (D9a-20), so that counsel knew what was forthcoming. Counsel cross-examined Cpt. Fiocca, but did not direct any questions towards possible coercion of defendant or to any other circumstances that might alter the description by Cpt. Fiocca that the remarks of defendant were made voluntarily during a discussion over dinner in a public diner.

Sgt. Donnelly also testified he had been with defendant for seven or eight hours on that day (D8a-30) and was present with Cpt. Fiocca, Gallagher and defendant, in the car during the ride from Philadelphia (D9a-7). He had a conversation with defendant in the City of Philadelphia, in the car going back to Wildwood and in the diner on the way back (D8a-34 to D9a-5). He stated that Tiesi said he was sorry it happened and he was sorry he got Gallagher fouled up (D9a-32). The only objection raised by counsel to this testimony was that the question was too broad (D9a-10), and that the answer was not responsive (D9a-15), and there was no pertinent cross-examination of Donnelly on the circumstances surrounding defendant's remarks.

Following the testimony of Sgt. Donnelly and Cpt. Fiocca, the suborned witness, Harry Gallagher, testified to hearing a conversation between the two officers and defendant in the car returning to Philadelphia (D13a-10). At this time,

counsel made his initial objection to testimony of defendant's remarks made in the automobile. Counsel specifically stated as his reasons that defendant was manacled, and in a police car (D13a-30), and requested that the testimony of officers Donnelly and Fiocca "with regard to this conversation" (D13a-35) be stricken. However, he made no comment or motion directed to the statements already testified to by Cpt. Fiocca, that were made by defendant when he was not handcuffed and in the public diner. The statements in the diner were essentially identical to the statements made by the defendant in the car. The objection was overruled and Gallagher testified that defendant said he was sorry that he had caused everybody all this trouble (D14a-5).

Defendant submitted twenty-three written requests to the Court to charge the jury (D22a-20 to D27a-10) and later made several supplemental oral requests to charge (D39a-24 to D41a-20). None of these included a request to charge the jury to disregard the testimony of Officers Donnelly and Fiocca or of Gallagher, with respect to the statements made by the defendant during the trip from Philadelphia. The issue was not again raised at trial.

Thereafter, on May 13, 1964, defendant was found guilty by the jury on the charge of subornation of perjury contained in the indictment (D44a-20). A Notice of Motion for New Trial was filed on May 18, 1964 (D45a). The argument now raised by counsel in his petition for *certiorari,* concerning the testimony of Fiocca, Donnelly and Gallagher as to defendant's remarks during the Philadelphia to Cape May trip, was not included as a ground for new trial in this motion (D45a-15 to D46a-12). The motion was denied (D47a), and defendant appealed from the judgment of conviction and sentence thereon to the Superior Court Appellate Division (D49a) which affirmed the convic-

tion *per curiam* (P51a-20). Application was made by the petitioner to the Appellate Division for rehearing on March 16, 1965, (omitted from petition for *certiorari*) and this was denied on March 30, 1965. Defendant petitioned the New Jersey Supreme Court for certification (D51a-25), which was denied on May 12, 1965 (D52a-30).

REASONS FOR DENYING THE WRIT

I

There are no special or important reasons for this Court to grant the petition for a writ of *certiorari*, because the admission into evidence of remarks made by defendant in the automobile and in a public diner during the trip from Philadelphia did not violate any of his constitutional rights.

Initially, it should be noted that the remarks which are now complained of by defendant were not what could be considered in any light a confession nor were they even direct admissions of guilt. At most they were incriminating statements, though susceptible of dual meaning. Cross-examination of any of the witnesses who testified to these remarks could well have neutralized any effect that they had, but this was never attempted by counsel. The defendant himself could have offered an explanation of the remarks, if any adverse inference which they created was not correct, but the record is bare of any testimony by defendant in this direction.

Furthermore, counsel did not object to the admission of these remarks from the first two witnesses who testified to them. *Cf. State* v. *Rhams*, 14 N. J. 282 (1954). When he did raise an objection at the time the third witness, Gallagher, was about to repeat the statements, he based this

on the ground that Tiesi was handcuffed and in a police car at the time he made them. However, Cpt. Fiocca had previously testified to an almost identical statement by defendant made after the handcuffs had been removed and while they were having dinner together in a public diner, so that it is not clear if counsel was actually objecting to all of the statements made by defendant or just some of them. Counsel cannot claim surprise as a reason for not objecting, as two previous witnesses had testified to the same or similar remarks in their direct testimony and he had engaged them in lengthy cross-examination, albeit on other aspects of their testimony, before he raised his first objection.

Even more significant, counsel did not make this part of his motion to dismiss at the end of the State's case (D21a-10), and he made no request to the court to charge the jury to disregard the remarks now complained of (D22a-22). *Cf. State* v. *Auld*, 2 N. J. 426 at 436 (1949). Nor did he raise these statements as a ground for new trial on the motion he made following conviction (D45a). Thus the importance of the remarks complained of, with respect to any prejudice to the defendant or infringement of his constitutional rights, was insignificant even to counsel, and appears to be raised now as an afterthought.

In every case cited by the defendant, and in every case setting forth the principle which defendant argues should be applicable to the instant matter, a direct confession of guilt was involved. In the instant matter the defendant certainly did not confess his guilt to any of the three witnesses who rode with him from Philadelphia. He simply and casually agreed with them that he too was sorry he had caused any trouble to Harry Gallagher. The trouble to which he referred could have been any of several matters between defendant and Gallagher which were referrd to in

various portions of the testimony that has been omitted by defendant in the appendix filed with this Court. Thus, he may have regretted the trouble he caused Gallagher, illustrated by the wage claims made against him by Gallagher, the loss of Gallagher's employment with defendant, or even Gallagher's involvement in a false swearing indictment. The latter circumstance, if this was what defendant was referring to, though arising out of the incident could certainly not be construed to be a confession by Tiesi that he was guilty of subornation of perjury.

Furthermore, the circumstances surrounding defendant's statements do not compare in any respect with the facts of the cases which apply the principles asserted by defendant to be applicable to the instant matter. His was a casual conversation over dinner in a public diner or in the automobile on the trip from Philadelphia. There was absolutely no pressure, coercion or deception. Tiesi had not asked to be allowed to speak to an attorney before engaging in conversation during this trip though he was well versed in all of these procedures and he could just as easily have chosen to be silent and not speak to the other passengers. Certainly Gallagher, who already had been convicted and sentenced, had no advantage to gain by a confession from defendant.

Furthermore, the instant matter does not involve any "involuntary confession" by Tiesi. His statements were not a confession, nor even of the character of oral admissions which have been considered by courts under the cases and principles he asserts. They were simply voluntary, idle remarks made in general conversation. It is to be noted that counsel never requested or suggested any kind of hearing on the voluntariness of the statements in issue, *Jackson* v. *Deimo,* 378 U. S. 368 (1964).

Even if the remarks he made were to be considered as a confession, they certainly, on the facts adduced at trial, were not involuntary within the meaning of the cases. In light of all the circumstances surrounding the making of these remarks by defendant, it cannot be said that they were obtained by surreptitious means when he was unaware he was being interrogated by a police officer, *Massiah* v. *U. S.*, 377 U. S. 201 (1964); that they were extracted by threats of violence, sustained pressure or other circumstances amounting to mental, physical or psychological coercion or unfairness in the due process sense, *State* v. *Smith*, 32 N. J. 501 (1960) *cert. den.* 364 U. S. 936 (1961), *Spano* v. *People of the State of New York*, 360 U. S. 315 (1959); or that they resulted after defendant had requested and been denied the right to consult with counsel, *Escobedo* v. *State of Illinois*, 378 U. S. 478, 84 S. Ct. 1758 (1964).

We respectfully submit that defendant is endeavoring to exaggerate the effect and meaning of certain remarks made by him in passing conversation, in order to liken them to a confession within the meaning of the cases to which he refers. These remarks were not, however, what could be considered in any light a confession, nor were they even direct admissions of guilt. At most they were incriminating statements admissible in evidence as such, though as noted susceptible of dual meaning.

Counsel relies on cases dealing with the issue of voluntariness of confessions, as well as more recent cases dealing with the right to counsel at the time a confession is made. Had defendant's counsel considered that these incriminating statements were confessions and that there was an issue as to whether or not his client was coerced physically or mentally into making them, then, when they were introduced at trial, his recourse would have been to request a hearing on the issue of voluntariness. *State* v.

La Pierre, 39 N. J. 156, 162-163 (1963); *State* v. *Johnson,* 43 N. J. 572, 586, (1965). This procedure was not new to New Jersey practice at the time of trial in the instant matter as counsel, an experienced practitioner, was well aware, and our procedure conforms to the constitutional requirements of *Jackson* v. *Denno,* 378 U. S. 368 (1964). This was not done, nor was reference ever made by counsel to any question of voluntariness. Furthermore, the record does not reveal that the defendant himself attempted to deny these statements at trial nor that he gave any testimony indicating they were made as a result of physical or mental coercion prior to or during the automobile ride from Philadelphia.

II

The petition for a writ of *certiorari* should be denied because of petitioner's failure to comply with Rules 21-2, 23-1(b)(ii), 23-1(c), 23-1(d), 23-1(e) and 23-1(f), pursuant to Rule 23-4 of this court (28 U. S. C.).

In connection with the present application of petitioner, the only document with which the State of New Jersey has been served is the printed petition for *certiorari.* That document does not conform to the rules of this court. It includes an appendix which purports to contain the record of the trial, but in fact contains only limited partial excerpts. In fact, if a comparison were made between the transcript of the trial and the record included in the appendix, in some instances the purported appendix has only a partial answer to a question or does not contain the question asked. Furthermore, it does not contain the application for rehearing made by defendant to the Appellate Division of the New Jersey Superior Court on March 16, 1965, or the court's denial thereof on March 30, 1965, as

required by Rule 23-1(b)(ii). The petition is otherwise deficient on its face insofar as conformity with the Rules of this Court.

Respondent has never been served with the notice required by Rule 21 (2) indicating the contents of the record that had been filed, pursuant to that rule. This office learned that the petition had been accepted for filing only by telephoning the office of the Clerk of the Supreme Court.

All of these matters may appear to be technical requirements, but in fact have an important bearing in determining whether petitioner has described "* * * with accuracy, . . . and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration . . ." (Rule 23-4). For example the requirement that petitioner make reference to any order respecting rehearing, which petitioner in this case has failed to do, permits this Court to understand not only how many courts have already studied the questions sought to be reviewed, but also how many times each court has had an opportunity to do so.

Furthermore, the State respectfully questions the accuracy of the impression of the case sought to be conveyed to this Court by virtue of the phraseology of the "Question Presented" (Rule 23-1(c)), and certain allegations in the "Statement of Facts." (Rule 23-1(e)). For example, the "Question Presented" states "that an incriminating statement was elicited by police." The word "elicited" infers that the incriminating statement was intentionally drawn from the defendant by the police (page 268, Websters 7th New Collegiate Dictionary), whereas in fact an examination of the record shows that the statement was spontaneously made by the defendant in an informal general conversation being carried on during the course of the ride back

from Philadelphia, and again during the course of dinner in a public diner.

It is represented in the "Question Presented" that the statement of defendant "was admitted over the defendant's counsel's objection." It is also represented that the statement was made while defendant was "handcuffed" and "without the presence of counsel" and that he "was not advised of his right to remain silent." A reading of the question therefore, gives the impression that defendant's counsel objected to the admission into evidence of the statement made by defendant when it was initially offered and that his objection was based on the factors of handcuffing, absence of counsel, and absence of advice of defendant's right to remain silent. In fact, however, the first time this statement was sought to be introduced, the only objection made by counsel was that the question was too broad and that the answer was too responsive. The second time it was offered, through Captain Fiocca, there was a similar objection. It was not until the third consecutive witness made reference to the statement that counsel objected, but at this time he asserted only one of the three reasons now being asserted, handcuffing, and this could apply only to the statement made in the car and not in the public diner where admittedly he was not handcuffed.

Similarly, the "Statement of Facts" contains reference to a motion to strike the testimony. As previously noted, there was never any formal motion made by counsel to strike the testimony in question. The only action in this respect was that at the time the third witness was about to testify, there was an objection to the testimony and an oral motion to strike the testimony given by the two previous witnesses. This was denied at the time. Counsel never renewed this motion during the course, or at the conclu-

sion, of the trial and although he submitted twenty-three written requests to charge at the conclusion of the case, he never requested the court to charge the jury to disregard this testimony. Even following the court's charge, when counsel added several oral supplemental requests to charge, counsel did not include among these a request that the court charge the jury to disregard any reference to the statements made by defendant in the presence of the police officers.

Furthermore, following his conviction, although counsel did move for a new trial alleging six grounds for relief, the admission of the testimony in question was not included among his reasons.

Thus the phrasing of alleged facts contained in the petition does not present to the Court an accurate and clear picture of that which actually occurred.

In addition, Rule 23 (1) (d) requires that the constitutional provisions or regulations which the case involves should be set forth verbatim with citations. An examination of the petition for *certiorari* shows that there is no reference whatsoever by petitioner to the specific constitutional provision he claims has been violated.

Finally, counsel has not indicated where in the course of the proceedings at the trial the Federal questions were first raised, pursuant to Rule 23(1) (f), or that they were properly raised. The confusion as to this point alone, which is created by the partial record contained in the appendix, and the terminology used and references made in the "Questions Presented" and "Statement of Facts," attests to the importance of compliance with the Rules of the Court referred to above.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be denied.

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